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Case Number: UT/2023/000018

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice,
Rolls Building, London

INCOME TAX AND NATIONAL INSURANCE – intermediaries legislation – IR35 – personal service company – third stage of the RMC *criteria in determining existence of employment – meaning and relevance to employment status of being in business on own account – Court of Appeal decision in* Atholl House

Heard on: 5 and 6 February 2024
With further written submissions on
20 February 2024 and 5 March 2024
Judgment date: 07 June 2024

Before

MR JUSTICE MEADE
JUDGE THOMAS SCOTT

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

BASIC BROADCASTING LIMITED
Respondent

Representation:

For the Appellants: Adam Tolley KC and Marianne Tutin, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: James Rivett KC and Quinlan Windle, instructed by Clintons LLP

DECISION

INTRODUCTION

1. Mr Adrian Chiles is a well-known television and radio presenter. During the period from 6 April 2012 to 5 April 2017, with which this appeal is concerned, Mr Chiles supplied his services to ITV and the BBC through his personal service company, Basic Broadcasting Limited ("BBL"). HMRC issued determinations in respect of income tax and notices of decision in respect of national insurance contributions ("NICs") to BBL for the tax years within that period. The determinations and decisions were made on the basis that the relevant contracts fell within the intermediaries legislation (commonly known as "IR35"), and that Mr Chiles' status for the purposes of that legislation was that of an employee. As a consequence, BBL was liable to income tax of £1,249,433 and NICs of £460,739.

2. BBL appealed against the determinations and decisions to the First-tier Tribunal (Tax Chamber) (the "FTT"). The appeal was heard in November 2019, but, most unfortunately, the judge contracted Covid and suffered from long Covid, which prevented her from writing the decision. By agreement with the parties, the appeal was partly reheard by a different FTT panel in November 2021.

3. In a decision released on 9 February 2022 (the "Decision"), the FTT allowed BBL's appeal. HMRC now appeal against the Decision.

4. HMRC and BBL were represented before the FTT by the same counsel as in this appeal. We are grateful to all counsel for their clear written and oral submissions.

THE LEGISLATION AND THE ISSUE BEFORE THE FTT

5. The purpose of the intermediaries legislation was described by Robert Walker LJ (as he then was) in *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945 at [51], as being:

> to ensure that individuals who ought to pay tax and NICs as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation.

5. The question whether the intermediaries legislation applies to any particular set of circumstances is determined by reference to sections 48-61 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"). The equivalent provision for NICs purposes is Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000. The parties agree that in the circumstances of this appeal there is no material difference in the effect of the two sets of provisions. Therefore, as did the FTT, we focus in this decision on the provisions in ITEPA 2003.

1. Section 49 ITEPA 2003 provided as follows:

> (1) This Chapter applies where —
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),

> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.
>
> …
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

2. The FTT found that section 49(1)(a) and (b) were satisfied on the facts in relation to the contracts relevant to this appeal. Mr Chiles is "the worker", ITV and the BBC are "the client" and BBL is "the intermediary". The only issue for the FTT was whether, if the services provided by Mr Chiles had been provided under contracts directly between ITV/BBC and Mr Chiles, Mr Chiles would have been regarded for income tax purposes as an employee of ITV/BBC[1].

THE APPROACH TO DETERMINING WHETHER THE INTERMEDIARIES LEGISLATION APPLIES

3. The contract postulated by section 49(1)(c) ITEPA 2003 has come to be termed the "hypothetical contract", and we refer to it as such below.

4. In considering the application of the intermediaries legislation, the FTT should carry out a three-stage analysis. Somewhat confusingly, the third stage of that analysis itself entails the determination of another three issues, being those set out in relation to the identification of employment status in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*RMC*").

5. The three-stage analysis with which the FTT should begin has been summarised as follows by the Court of Appeal in *Kickabout Productions Ltd v HMRC* [2022] EWCA Civ 502 ("*Kickabout*") at [7]:

> (1) Stage 1: Find the terms of the actual contractual arrangements and the relevant circumstances in which the individual worked.
>
> (2) Stage 2: Ascertain the terms of the "hypothetical contract".
>
> (3) Stage 3: Consider whether the hypothetical contract would be a contract of employment or a contract for services.

6. At Stage 3, there is no statutory definition of employment in this context, but it is generally accepted that the test to identify whether a contract is a contract of service remains that set out by MacKenna J in *RMC* at page 515:

> I must now consider what is meant by a contract of service.
>
> A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master, (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make

[1] The FTT refused applications by BBL to amend its grounds of appeal and for disclosure.

> that other master, (iii) The other provisions of the contract are consistent with its being a contract of service.

7. These three criteria are generally referred to as mutuality of obligation, control and the "third stage".

8. We refer below to the three stages identified in *Kickabout* as Stages 1, 2 and 3, and to the three conditions identified in *RMC* as mutuality, control and the Third RMC Stage.

9. MacKenna J gave his guidance over fifty years ago and IR35 was implemented almost twenty-five years ago. However, the case law in relation both to employment status and IR35 has not only developed considerably over time, but continues to be in a state of flux. The position in relation to mutuality of obligation awaits clarification by the Supreme Court in *HMRC v Professional Games Match Officials Limited*; the approach to be taken at Stage 2 and at the Third RMC Stage must now be seen in light of the Court of Appeal's decision in *HMRC v Atholl House Productions Limited* [2022] EWCA Civ 502 ("*Atholl House CA*"), and the meaning and significance of a taxpayer being in business on their own account continues to evolve.

10. Presented with this moving target, taxpayers and their advisers must nevertheless grapple with whether the legislation applies to any particular engagement, and the courts and tribunals must do the same. However, it should not be forgotten that behind every personal service company is a person, and, as we have seen in this case, the uncertainty and financial exposures generated by the difficulty in establishing a clear and stable legal position continue to produce a very real human cost.

THE FTT'S DECISION

11. The Decision was methodical, thorough and detailed (some 357 paragraphs). References below in the form FTT[x] are to paragraphs of the Decision.

12. The FTT set out the background at FTT[1]-[4] as follows:

> 1. Mr Adrian Chiles is a well-known television and radio presenter. He started work at the BBC as a journalist in 1992 at the age of 25. In or about 1996 the BBC required Mr Chiles to cease his employment with a view to his services being provided through what is known as a personal service company. He set up the appellant ("BBL") for that purpose and ceased his employment. At the same time, BBL entered into contracts with the BBC for the provision of Mr Chiles' services. By 2010, BBL was providing Mr Chiles' services to the BBC to present three different programmes, namely 'The One Show', 'Match of the Day 2' and 'The Apprentice: You're Fired'.
>
> 2. In June 2010, BBL's contract to provide Mr Chiles' services to the BBC came to an end and BBL entered into a contract to provide his services to ITV. Mr Chiles was to be a presenter on ITV's new flagship breakfast television programme called 'Daybreak', as well as presenting ITV's coverage of live football and certain other factual entertainment programmes. ITV's football coverage included Champions League and international football matches. BBL contracted with ITV to provide Mr Chiles' services in relation to those programmes. Mr Chiles ceased to be a presenter of Daybreak in November 2011 but BBL's contract with ITV continued and he continued to present live football on ITV until 2015.

> 3. In 2013, BBL contracted with the BBC for Mr Chiles to present programmes on BBC Radio 5 Live. Mr Chiles continues to present programmes on BBC Radio 5 Live.
>
> 4. This appeal is concerned with tax years 2012-13 to 2016-17, covering the period from 6 April 2012 to 5 April 2017. During that period BBL provided Mr Chiles' services pursuant to two ITV contracts ("the ITV Contracts") and three BBC contracts ("the BBC Contracts") in addition to other work for other parties. HMRC have issued determinations in respect of income tax and notices of decision in respect of national insurance contributions ("NICs") to BBL for those tax years.

13. The FTT had available to it all the evidence which was before the FTT at the first hearing, and made detailed primary findings of fact in the following areas:

(1) Mr Chiles' work history before and during the period covered by the appeal: FTT[23]-[57].

(2) The ITV Contracts and the BBC Contracts (together the "Contracts"): FTT[58]-[110].

(3) The negotiation of the Contracts: FTT[111]-[123].

(4) The performance of the Contracts: FTT[124]-[178].

(5) Mr Chiles' work and income outside the Contracts: FTT[179]-[192].

14. The FTT set out its approach to determining the terms of the hypothetical contracts. It noted that section 49(1)(c) ITEPA 2003 requires a focus on the actual contracts and the arrangements pursuant to which the services are provided. The FTT followed the approach suggested by the Upper Tribunal in *HMRC v Atholl House Productions Limited* [2021] UKUT 37 (TCC) ("*Atholl House UT*") of approaching the construction of the hypothetical contracts as a counter-factual exercise, in which the written contracts are "a safe starting point", but having regard to certain "hypothetical flashpoint scenarios" in which there would be a conflict between the written terms and the conduct of the parties.

15. The FTT set out its findings as to the terms of the hypothetical contracts in Annexes to the Decision, explaining at FTT[196]-[201] the reasons for those findings.

16. In this appeal, HMRC do not challenge the FTT's primary findings of fact or its conclusions as to the terms of the hypothetical contracts.

17. The FTT set out the relevant case law on employment status, taking as its starting point the statements in *RMC*. As regards the three *RMC* conditions, the FTT decided as follows:

(1) It was accepted by BBL that there would be sufficient mutuality between Mr Chiles and the BBC under the BBC Contracts. The FTT decided that there was also sufficient mutuality between Mr Chiles and ITV under the ITV Contracts: FTT [207]-[222] and FTT [281]-[288].

(2) In relation to all of the Contracts, there was a sufficient framework of control to satisfy the control condition: FTT[223]-[244] and FTT[289]-[317].

(3) In relation to the Third RMC Stage, the FTT discussed the arguments of the parties and the relevant case-law in considerable detail, at FTT[245]-[278]. The FTT's reasoning and conclusion form the basis of this appeal. In brief summary, the FTT decided as follows. It considered that the most significant factor which might displace the *prima facie* case that Mr Chiles was an employee under the hypothetical contracts was whether he was in business on his own account, but only if the hypothetical contracts could properly be seen as part of that business. It stated that this was the approach taken in *Atholl House UT* and other cases: FTT[320]. Having considered that question, the FTT then discussed a number of factors which HMRC relied on as supporting employment status: FTT[334]-[353]. The FTT's conclusion, at FTT[354], was that in relation to all of the Contracts, the hypothetical contracts would not have been contracts of employment, and, as a result, BBL's appeal was allowed.

18. BBL do not challenge by way of cross-appeal or Respondent's Notice the FTT's findings as to the existence of mutuality and control. The only issue in this appeal is whether, as HMRC contend, the FTT erred in law in its determination of the Third RMC Stage.

HMRC'S GROUNDS OF APPEAL

19. The FTT deferred consideration of HMRC's initial application for permission to appeal until the handing down of the decision in *Atholl House CA*. HMRC's application was then revised. The FTT granted permission to appeal on the following grounds:

(1) The FTT erred in law in its interpretation and/or application of the third stage of the *RMC* test in that:

(a) The Tribunal wrongly adopted the test of whether Mr Chiles was in business on his own account, instead of the correct analysis required at the third stage of the *RMC* test; and

(b) The Tribunal did not put the relevant terms of the hypothetical contracts at the heart of its analysis at the third stage of the *RMC* test; alternatively, did not take those terms into account.

(2) Further or alternatively, the FTT erred in law and/or took into account irrelevant considerations and/or failed to take into account relevant considerations in its approach to the question whether Mr Chiles was "in business on his own account" in relation to the relevant contractual engagements between BBL and each of ITV and the BBC in that:

(a) The FTT erred in asking whether Mr Chiles was generally in business on his own account, rather than whether he was in business on his own account in relation to the terms of his specific hypothetical contracts with each of ITV and the BBC; and

(b) The FTT wrongly disregarded or marginalised cogent factors, such as the length of the contracts, the level of required work commitment and the relationship of financial dependency thereby generated, in determining whether, in relation to the terms of the specific hypothetical contracts in question, Mr Chiles was in business on his own account.

20. The procedural background to the grant of permission is important. The following summary is taken from the FTT's decision granting permission. In *Atholl House CA*, the

Court of Appeal stated (broadly) that it was only matters which were known or reasonably available to the parties which could be taken into account at the Third RMC Stage. Initially, BBL accepted that that there was an error of law in the Decision, namely a failure to take into account whether certain matters relevant to the Third RMC Stage were known or reasonably available to the BBC and ITV. BBL later changed its position, submitting that there was no such error of law because it had not been part of HMRC's pleaded case that the relevant matters were not known or reasonably available to the BBC and ITV. It was part of HMRC's argument in relation to Ground 1(b) and Ground 2(a) above that the FTT failed to take into account whether relevant matters were known or reasonably available to the BBC and ITV. HMRC had initially applied to amend their statement of case to include these arguments, but BBL had opposed that. In granting permission, the FTT stated as follows:

> The Appellant has invited me to deal with the Respondent's application to amend its Statement of Case. I do not consider it appropriate to do so for the following reasons:
>
> (1) The application was expressly made on the basis that the Respondents do not consider that any amendment to their Statement of Case is required in order to pursue the grounds in their application for permission to appeal.
>
> (2) It is properly a matter for the Upper Tribunal whether the Respondents should be permitted to argue, in support of their grounds of appeal, that the [FTT] failed to take into account whether relevant matters were known or reasonably available to ITV and/or the BBC.

21. So, one of the issues we must determine in this appeal is whether HMRC should be allowed to pursue the argument as to actual or constructive knowledge. The fact that permission to appeal has been granted for a ground does not mean that it is necessarily appropriate for this Tribunal to permit it to be argued: see *CF Booth Limited v HMRC* [2022] UKUT 00217 (TCC), at [73]-[75], applying *Mullarkey v Broad* [2009] EWCA Civ 2.

APPROACH TO HMRC'S GROUNDS OF APPEAL

22. As we have explained, BBL objects to HMRC being permitted to argue in this appeal that one of the errors made by the FTT was that it failed to take into account whether certain matters relevant to the Third RMC Stage were known or reasonably available to the BBC and/or ITV. That forms part of HMRC's argument under Ground 1(b) and Ground 2(a). In our view, one important matter relevant to the evaluation of whether HMRC should be permitted to run that argument is our decision as to whether, without taking that argument into account, the FTT made a material error of law such that its decision must in any event be set aside. If the FTT's decision must be remade or remitted in any event, then that would be a relevant factor in the balancing exercise as to the admissibility of the argument.

23. Therefore, we have approached the appeal by first considering HMRC's grounds of appeal on the assumption that their argument as to knowledge is not admitted.

GROUND 1: THE THIRD RMC STAGE

Arguments of the parties

24. We now consider Ground 1, on the basis that the argument as to knowledge is not at this stage admitted.

25. For HMRC, Mr Tolley made the following arguments:

(1) The Court of Appeal in *Atholl House CA* held that the Third RMC Stage is a multi-factorial test. Its purpose is to assess whether, notwithstanding the existence of mutuality and control, the "provisions of the contract as a whole are consistent with its being a contract of service": *RMC* at 516-517. In its analysis of the Third RMC Stage, the FTT focussed entirely on whether Mr Chiles was in business on his own account and whether the hypothetical contracts could be seen as part of that business. This was the same error as the Upper Tribunal fell into in *Atholl House UT*.

(2) For the purposes of the third stage assessment, the tribunal may take into account relevant factors other than the express and implied terms of the contract: *Atholl House CA* at [122]. The fact that the individual performs services for others as an independent contractor is relevant, "but it goes no further than that": *Atholl House CA* at [128]. The focus of the tribunal must be on the particular engagement entered into and the terms of the hypothetical contract must remain "central to the enquiry": *Atholl House CA* at [130].

(3) Asking whether a person is generally in business on their own account cannot assist in determining whether a particular engagement would be an employment. It is not the nature of the activities which matters, but the capacity in which they are performed.

(4) Having purported to apply the *RMC* test of employment status, the FTT erred in eliding the Third RMC Stage with a freestanding "business on own account" test. It applied that test as if it were by far the most important determinant at the third stage. In doing so, the FTT was following *Atholl House UT*, but thereby fell into the same error as that identified in *Atholl House CA*.

(5) The FTT also erred in concluding that the extent of control by the BBC and ITV was not a compelling factor pointing toward employment.

(6) The FTT failed, as directed by *Atholl House CA*, to place the hypothetical contracts at the centre of the enquiry. Instead, it focussed almost exclusively on Mr Chiles' general ways of working and asked itself the wrong question of whether the hypothetical contracts were entered into as part of that business. In doing so, it took into account irrelevant matters and failed to take into account relevant matters.

26. For BBL, Mr Rivett argued as follows:

(1) HMRC were attempting to reargue the case and interfere with an evaluative decision of the FTT, and also attempting to conflate the considered approach taken by the FTT with the error of law identified in *Atholl House CA*.

(2) The FTT correctly directed itself as to the applicable test at the Third RMC Stage, and conducted a careful and thorough analysis of all potentially relevant factors, including the terms of the hypothetical contracts and whether Mr Chiles would have been in business on his own account.

(3) The Upper Tribunal should be very reluctant to interfere with an evaluative judgment of the FTT unless it is clear that the FTT misdirected itself as to the law,

misapplied the law to the facts or reached an irrational conclusion on the facts found. None of those errors was committed by the FTT.

(4) The Decision must be read in the round, avoiding over-analysis or undue focus on particular passages or turns of phrase.

(5) In *Atholl House CA*, the Court of Appeal rejected HMRC's argument that whether a person was in business on their own account could not be considered as part of the Third RMC Stage: indeed, it could be an important factor. The error of approach in *Atholl House UT* which was identified by the Court of Appeal was therefore not simply applying the business on own account test, which the Court of Appeal accepted as an appropriate approach in some cases, but the Upper Tribunal's comparative approach to that test, namely asking whether the activities performed by Ms Adams for the BBC were "of the same nature and kind" as those she carried on as an independent contractor.

(6) HMRC's argument that the FTT erred in its approach to the "business on own account" test fails to grapple with the different ways in which that phrase has been used in the case law. The FTT used the question of whether Mr Chiles would have been in business on his own account both to describe his activities separate from the hypothetical contracts and to express the Third RMC Stage. The FTT understood the difference between these uses, both of which are correct as a matter of law and consistent with *Atholl House CA*.

(7) The FTT Decision did consider *Atholl House UT* and treat it with the respect due to a recent, binding decision in a similar area, but did not slavishly follow it and did not adopt the comparative approach used in *Atholl House UT*. The FTT was well aware of HMRC's then forthcoming appeal against the decision in *Atholl House UT*.

(8) HMRC's argument as to the relevance of control at the Third RMC Stage is an impermissible argument as to the weight to be afforded to a factor.

(9) HMRC's argument that the FTT did not put the terms of the hypothetical contracts at the centre of its enquiry is an attempt to elevate comments of Sir David Richards to a principle of law. It also fails to reflect the context of Sir David Richards' statement. In any event, while the terms of the hypothetical contracts are important, the weight to be given to different factors will vary and is a matter for the FTT: *Atholl House CA* at [86] and [124].

(10) The irrelevant matters said by HMRC to have been considered by the FTT were all relevant. As to the terms of the hypothetical contracts which HMRC said the FTT failed to take into account or afforded insufficient weight, the FTT considered the matters specifically raised by HMRC and took into account all the terms of the hypothetical contracts. There was no need to refer again to each and every term.

Discussion: business on own account in different contexts

27. There are a number of threads to Ground 1, but disentangling them there are essentially three errors of law asserted by HMRC, which can be summarised as follows. First, the FTT made the same "comparative" error as the Upper Tribunal in *Atholl House UT*. Second, the FTT focussed unduly on the business on own account test and failed to keep the terms of the hypothetical contracts at the centre of its enquiry. Third, the FTT's evaluation of the

hypothetical contracts took into account irrelevant factors and failed to give weight to relevant factors.

28. The first two asserted errors both relate to the meaning and function of the "business on own account" test at the Third RMC Stage, so we begin by taking stock of where the law currently stands on this issue, following *Atholl House CA*.

29. The third stage becomes relevant only if the necessary mutuality and control have been found to exist. In *RMC* itself, MacKenna J expressed this question as whether " the other provisions of the contract are consistent with its being a contract of service". HMRC previously took the position that this wording was narrow in two important respects, namely that it required an exclusive focus on the terms of the contract and that it took as its starting point a prima facie affirmative conclusion of employment. The Court of Appeal in *Atholl House CA* firmly rejected both propositions: see in particular [61], [75], [113].

30. MacKenna J in *RMC* made no mention of the question of whether the individual in question was in business on their own account, either as regards engagements other than the contract in dispute, or as regards the contract itself. The origin of that formulation as a way of determining employment status might be thought to have resulted from a modernisation of the *RMC* test, but it has its genesis in the earlier observations as to determining employment status of Lord Wright in *Montreal v. Montreal Locomotive Works Ltd* [1947] 1 D.L.R. 161, where he said, at page 169:

> In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

31. That observation was one of several relied on by Cooke J in *Market Investigations Ltd v Minister for Social Security* [1969] 2QB 173 ("*Market Investigations*"*),* where he said this, at page 184:

> …the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account? " If the answer to that question is " yes," then the contract is a contract for services. If the answer is " no," then the contract is a contract of service.

32. Pausing there, it is clear that here the formulation is being used simply as another way of expressing the question posed by MacKenna J, or, perhaps more accurately, a helpful way of answering it. That is put beyond doubt by the wording immediately following this passage, at page 185:

> No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of

> responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.
>
> The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him.

33. Importantly, the second paragraph of this passage from *Market Investigations* is using the concept of business on own account in a different context, namely in relation to existing or prior activities outside the contract in dispute.

34. Sir David Richards referred at [88] of *Atholl House CA* to "the important observation" of Dillon LJ in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 614 ("*Nethermere*") at page 633:

> In some cases, as for instance, with a jobbing gardener or a carpenter or a music teacher, who is found to be carrying on the activities in question for several customers or clients as part of his or her own business, the test may be very helpful indeed, but in many other cases the answer to the question whether the person concerned is carrying on business on his or her own account can only come as the corollary of the answer to the question whether he or she was employed under a contract of service.

35. This passage appears to be considering the business on own account position both in relation to the contract in question and outside that contract.

36. In that passage, Dillon LJ had noted the reference by Cooke J in *Market Investigations* to Lord Wright's observation in the *Montreal* case which we have set out above, and then said this:

> It is important to have in mind that each case must depend on its facts, and the same question, as an aid to appreciating the facts, will not necessarily be crucial or fundamental in every case.

37. In *Atholl House CA,* Sir David Richards prefaced his review of the "business on own account" issue as follows, at [61]:

> I will below review some of the authorities and the way they have developed. From this review, I have reached a number of conclusions relevant to this appeal. First, there is not a dichotomy between the *RMC* test on the one hand and the approach in *Hall v Lorimer* and the line of authorities of which it is part on the other. They do not represent significantly different tests for determining employment. Second, the question posed in *Hall v Lorimer* and other authorities as to whether a person is in business on their own account is, for the most part, simply another way of asking whether they are an independent contractor. If the evidence establishes that they do in fact conduct a business on their own account, quite apart from the engagement in dispute, that may be a relevant factor in the determination of the issue – a point to which I will return. But, as used in the authorities, that is not the situation to which this phrase is generally applied. See in this respect the observation of Dillon LJ in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 614, which I set out below when referring

> to that case. Third, the factors to which a court or tribunal can have regard when assessing whether a contract is a contract of employment or a contract for services are not confined only to the terms of the contract and the effects of those terms.

38. Sir David Richards then reviewed in detail the leading authorities on employment status. In relation to the "business on own account" formulation, he set out the following well-known passages from the judgment of Mummery J in *Hall v Lorimer* [1992] 1 WLR 939 ("*Hall v Lorimer*"), at 944-945:

> It is clear from these cases [*RMC*, the Privy Council decision in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 and *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173] that there is no single satisfactory test governing the question whether a person is an employee or is self-employed. As Lord Griffiths observed in the last, most recent and authoritative case the question has never been better put than by Cooke J. in the *Market Investigations* case, at p. 184G. The question is: does the taxpayer perform his services as a person in business on his own account? If he does, his work as a vision mixer for the various television production companies must be regarded as performed under a series of contracts for services, entered into by him in the course of carrying on his own business. If he does not, his work must be regarded as performed under a series of contracts of employment with those companies.
>
> In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.
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> …
>
> The decided cases give clear guidance in identifying the detailed elements or aspects of a person's work which should be examined for this purpose. There is no complete exhaustive list of relevant elements. The list includes the express or implied rights and duties of the parties; the degree of control exercised over the person doing the work; whether the person doing the work provides his own equipment and the nature of the equipment involved in the work; whether the person doing the work hires any staff to help him; the degree of financial risk that he takes, for example, as a result of delays in the performance of the services agreed; the degree of responsibility for investment and management; how far the person providing the services has an opportunity to profit from sound management in the performance of his task. It may be relevant to consider the understanding or intentions of the parties; whether the person performing the services has set up a business-like organisation of his own; the degree of continuity in the relationship between the person performing the services and the person for whom he performs them; how many engagements he performs and whether they are performed mainly for one person or for a number of different people. It may also be relevant to ask whether the person performing the services is accessory to

> the business of the person to whom the services are provided or is "part and parcel" of the latter's organisation.

39. Sir David Richards stated that "there is no suggestion in the judgment of Mummery J that he understood himself to be propounding an approach that was at odds with *RMC*, although he expressly set out his approach by reference to *Lee Ting Sang* and the Privy Council's endorsement of *Market Investigations*". He noted that in the Court of Appeal Nolan LJ cited Mummery J's judgment with approval, and referred at length to *Lee Ting Sang*. Sir David Richards then said this, at [96]:

> In this connection, Nolan LJ went on to say that the question whether an individual is in business on his own account, though often helpful, "may be of little assistance in the case of one carrying on a profession or vocation. A self-employed author working from home or an actor or a singer may earn his living without any of the normal trappings of a business." Clearly, Nolan LJ was not suggesting that an author or actor was less likely to be self-employed than a person carrying on a commercial business on their own account, only that the indicia applicable to a commercial business ("the trappings of a business") might well be inapplicable to a person carrying on a profession or vocation. Pointing out that the taxpayer in *Hall v Lorimer* customarily worked for twenty or more production companies and that the vast majority of his assignments lasted only a single day, Nolan LJ said "there is much to be said for the traditional contrast between a servant and an independent contractor. The extent to which the individual is dependent upon or independent of a particular paymaster for the financial exploitation of his talents may well be significant." Again, Nolan LJ was bringing into account factors which went beyond the terms of each separate engagement.

40. Sir David Richards referred to the IR35 decision in *Synaptek Ltd v Young* [2003] EWHC 645 (Ch) ("*Synaptek*"), in which Hart J stated, at [17]:

> The authorities show that there is no one test which is conclusive for determining into which category a particular contract falls. As Nolan LJ put it in *Hall v Lorimer* [1994] ICR 216, 226: "In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another".

41. It was noted by Sir David Richards that in *Synaptek* Hart J rejected a submission made on behalf of the taxpayer that once it was established that a person was carrying on business on their own account in respect of other engagements, it was "an extremely powerful pointer" to the engagement in question forming part of that business. Hart J considered that being in business on one's own account was "no doubt an important contextual circumstance to be taken into account", but was "no more than that", and the weight to be given to it was a matter for the tribunal.

42. In a passage which is important in this appeal, the Court of Appeal's analysis of the position in relation to the Third RMC Stage was set out as follows, at [122]-[124] of *Atholl House CA*:

> 122. In my judgment, this review of the authorities bears out the propositions which I earlier stated. It is wrong to treat *RMC* and the line of cases including *Hall v Lorimer* as representing two separate tests, with the possibility that the result in any particular case could depend on which test is applied. Both approaches recognise mutuality of obligation and the right of control as necessary pre-conditions to a finding that a contract is one of

> employment. Once those necessary, but not necessarily sufficient, conditions are satisfied, both approaches require the identification and overall assessment of all the relevant factors present in the particular case. In other words, they are both multi-factorial in their approach. A strict reading of the third condition in the *RMC* test might exclude consideration of any factor beyond the express and implied terms of the contract, and this is certainly the way that it has been interpreted in some of the authorities. There are, however, many other authorities in which a wider range of factors was taken into consideration and indeed, as recently as 2012, HMRC were successfully inviting the Upper Tribunal to do just that: *Matthews v HMRC*.
>
> 123. The more difficult question, in my view, is not whether other factors can be taken into consideration but what limit there is on the choice of such factors. For this, there must be a return to first principles. The relationship of employment is created by the employer and employee through the contract made by them. The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, to both parties. Those circumstances are the same as those comprising the factual matrix admissible for the interpretation of contracts: the "facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties" (*Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at [21]).
>
> 124. If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. In many of the cases, it has been taken into account for that purpose. The weight to be attached to it is a matter for the decision-making court or tribunal. If the contract provides, as did Ms Adams' contracts with the BBC, that she was a freelance contributor, the relevance of this fact arises directly from the contract's express terms.

43. Taking stock, we consider that the following principles can be drawn from the case law:

(1) Whether or not an individual is in business on their own account can be used in two contexts; in determining the status of the contract in question and in describing the individual's working practices outside that contract.

(2) The relevance of the issue differs depending on which of these contexts applies.

(3) As applied in determining the status of the contract in question, the formulation is one way of approaching the Third RMC Stage. It is not a different test to the Third RMC Stage, but simply one way of answering the question framed by MacKenna J.

(4) In determining the status of the contract in question, asking whether or not the individual was acting in business on their own account under that contract may be a helpful way of answering the question, and may even be "very helpful indeed" (*Nethermere*). However, that approach "may be of little assistance in the case of one carrying on a profession or vocation" (Nolan LJ in the Court of Appeal in *Hall v Lorimer*). The extent to which the approach is a helpful way of answering the Third RMC Stage depends on all the facts.

(5) The existence of a business on own account in the second context, namely the individual's working practices outside the contract in question, is a relevant factor in considering the employment status of the contract in question. It is "an important contextual circumstance", but is "no more than that": *Synaptek* at [20].

(6) While it would be "myopic to ignore" the existence of a business on own account outside the contract in question, the weight to be attached to that factor is a matter for the FTT: *Atholl House CA* at [124].

(7) The Third RMC Stage is not approached correctly by asking whether the activities under the contract in question are different in some relevant respect from activities performed by the individual outside the contract: *Atholl House CA*.

Atholl House

44. The decision in *Atholl House CA* is central to this appeal in relation to the meaning and significance of the "business on own account" test and its application at the Third RMC Stage. In particular, HMRC argue that in this case the FTT made the same, or similar, errors of approach to those which the Court of Appeal decided the Upper Tribunal had made in *Atholl House*. It is, therefore, necessary to consider that decision, and *Atholl House UT*, in detail.

45. The case concerned the application of the intermediaries legislation to services provided to the BBC by Atholl House, the personal service company of Ms Kaye Adams. The FTT allowed the appeal by Atholl House. The Upper Tribunal set aside the FTT's decision and remade it, but reached the same conclusion as the FTT. The Upper Tribunal concluded that, although the necessary mutuality and control existed in relation to the hypothetical contract, taking account of the Third RMC Stage the hypothetical engagement was inconsistent with a contract of employment.

46. The Upper Tribunal decided that when entering into the hypothetical contract, Ms Adams would have been carrying on business on her own account, and that over her career, Ms Adams had tended to carry on a business on her own account. At [112] of its decision the Upper Tribunal continued its analysis as follows:

> It is… necessary to consider whether the activities that Ms Adams performed for the BBC under the hypothetical contract were of the same nature and kind as those that she carried on as an independent contractor. It is also necessary, when doing so, to consider whether there is some relevant difference between the activities undertaken for the BBC and those performed as an independent contractor.

47. The Upper Tribunal considered that the extent of Ms Adams' economic dependency on the BBC was relevant, but that any such dependence had to be "understood in the context of Ms Adams' profession as conducted in surrounding tax years". It held that, on that basis, the degree of economic dependence was not sufficient to displace the conclusion that the hypothetical contract was not one of employment. The Upper Tribunal concluded at [116]:

> We therefore do not consider that there was any relevant difference between the characterisation of Ms Adams's activities under the hypothetical contracts in the 2015/16 and 2016/17 tax years and the characterisation of either (i) her activities under hypothetical contracts with the BBC in 2013/14 and 2014/15 or (ii) her other activities as a self-employed journalist and

> broadcaster in other tax years. Therefore, we consider that the prima facie conclusion reached at the end of Stage 2 is to be displaced because, when entering into the hypothetical contracts here at issue, Ms Adams would have been entering into business on her own account.

48. Following the passage on the Third RMC Stage quoted above, the Court of Appeal turned to the decision of the Upper Tribunal which was under appeal. As already mentioned, HMRC argue in this appeal that the FTT made the same, or similar, errors of law to those identified by the Court of Appeal in relation to *Atholl House UT*.

49. The errors of law in *Atholl House UT* which are potentially relevant to this appeal and which were identified by the Court of Appeal were described as follows, at [126]-[131]:

> 126. Having accepted the FTT's findings that Ms Adams had tended over her professional career generally to carry on her profession as an independent contractor and that her activities as an independent contractor included activities similar to those she performed for the BBC, the test which the UT set itself at [112]-[116] was whether there was "some relevant difference between the activities undertaken for the BBC and those performed as an independent contractor". Unless there was some such difference, Ms Adams would be performing her services under the hypothetical contract with the BBC as an independent contractor.
>
> 127. In my judgment, this approach is with respect to the UT flawed in a number of important respects.
>
> 128. First, as the UT recognised in the first sentence of [112], *Fall v Hitchen* had made clear that an individual can in the same tax year perform similar services both as an employee and as an independent contractor. It is not the activities that matter but the capacity in which, and the conditions under which, they are performed. For that purpose, it is a relevant fact, if known or reasonably available to the putative employer, that the individual performs similar services as an independent contractor, but it goes no further than that.
>
> 129. Second, insofar as this approach is concerned with the terms and circumstances under which Ms Adams performed her services, it is not the terms and circumstances of her other engagements which are in issue, but the terms and circumstances of her hypothetical contracts with the BBC. The terms and circumstances of her other engagements may well themselves have been varied and it cannot be assumed that, if analysed, all or indeed any of them would be found to be engagements as an independent contractor. They cannot be held up as a gold standard against which the contracts with the BBC were to be judged. Even if the FTT had received evidence of these other engagements and the circumstances in which they were made, the approach of the UT is misguided.
>
> 130. Third, save as regards the amount of time that Ms Adams' contractual commitment to present at least 160 shows a year took up ("a good proportion of her available working time"), there is no consideration at all by the UT of the terms of the hypothetical contracts. While I have rejected the notion that it is only those terms that may be considered, the terms of the contracts remain central to the enquiry. The UT failed to have regard to any other terms, including those that pointed in the direction of employment.
>
> 131. Fourth, when considering the time commitment for Ms Adams, the UT said that it needed "to be judged by reference to an appropriately broad sample of Ms Adams's professional career rather than simply by reference to a snapshot in the two years in dispute" and that any economic dependence on

> the BBC in those years "has to be understood in the context of Ms Adams's profession as conducted in surrounding tax years". I accept, of course, that the tribunal should not shut its eyes to the fact that Ms Adams had been performing as an independent contractor, if known or reasonably available to the BBC, for a period before the start of the years in dispute but again it goes no further than that. The critical periods remain the years in dispute, during which she may have become employed by the BBC for some of her working time, an issue which depends on an assessment of the hypothetical contracts in the circumstances in which they were made. If the UT's reference to "surrounding tax years" was intended to include years after the years in question, that must be wrong. Ms Adams' activities in later years cannot be used to assess whether she was employed in earlier years.

50. The Court of Appeal agreed with the Upper Tribunal in dismissing Atholl House's argument that the approach set out by the Supreme Court in *Autoclenz Ltd v Belcher* [2011] UKSC 41 applied in interpreting the relevant contracts. However, it decided that in light of the errors which had been identified, the Upper Tribunal's decision should be set aside.

51. Sir David Richards explained the Court's decision as to remit the case rather than remake it as follows, at [163]-[166]:

> 163. The findings that the hypothetical contracts would satisfy the irreducible minimum of mutuality of obligation and the right of control remain. What is now required is an assessment of whether overall there would under the hypothetical contracts have existed an employment relationship between Ms Adams and the BBC. For this purpose, there need to be taken into account the terms of the hypothetical contracts and their effects, and the circumstances in which such contracts would have been made insofar as they would have been known to both parties or were reasonably available to both parties.
>
> 164. This is an assessment which has yet to be made in this case on a correct basis. The FTT wrongly proceeded on a basis that left clauses 8.1 and 8.2 out of account. As explained above, the UT largely failed to take account of the many features of the contractual terms and their effects, some of which may be seen as pointing to an employment relationship while others may be seen as consistent with Ms Adams being an independent contractor. It largely focused on Ms Adams' freelance career and engagements without considering their relevance to her hypothetical contract with the BBC in the two years in question or the extent to which such information was known or reasonably available to the BBC.
>
> 165. This court has previously made clear that its own power to re-make a decision should be used sparingly and only if the court feels no real doubt about how the FTT or the UT, properly directed, would have decided the case: see *Newey (t/a Ocean Finance) v HMRC* [2018] EWCA Civ 791; [2018] STC 1054 at [111]-[112]. Like Henderson LJ in that case, I do not feel confident enough about the correct conclusion for this court to make the decision.
>
> 166. It is therefore, unfortunately, necessary for the case to be remitted. My provisional view is that the case should be remitted to the UT for the decision to be remade on the basis of the FTT's findings of fact, as corrected by the UT's decision on the *Autoclenz* point. I would, however, give the parties the opportunity to argue, if either wishes to do so, that further facts should be found and, if so, whether the parties should be confined to the existing evidence or (and, if so, on what basis) either party should be

> permitted to adduce further evidence. If any further fact-finding or evidence were permitted, it would then be necessary to decide whether the case should be remitted to the UT or the FTT.

52. In the event, the case was remitted by the Court of Appeal to the Upper Tribunal, and the Upper Tribunal concluded that it should in turn be remitted to the FTT. The FTT's meticulous and comprehensive determination of the remitted case is reported at [2024] UKFTT 00037 (TC) ("*Atholl House Remitted*").

The FTT's approach to the Third RMC Stage

53. We turn now to whether the FTT made the errors of law set out by Ground 1 in its approach to determining the Third RMC Stage. We remind ourselves that, given the FTT's findings that there was sufficient mutuality and control under the Contracts, this determination was critical in deciding the appeal.

54. The FTT helpfully set out the relevant principles and case law regarding the third stage at FTT[245]-[278], and then applied those principles at [318]-[355].

55. In terms of the applicable principles, the FTT began by determining that the level and nature of control found to exist should be taken into account at the Third RMC Stage: FTT[253]. That was clearly correct, and confirmed in *Atholl House CA*. The FTT accepted that at stage three there was a prima facie assumption of employment. That proposition was disapproved in *Atholl House CA*, but in this appeal neither party suggests that this resulted in any material error.

56. At FTT[260], the FTT set out the "business on own account" approach, by reference to *Market Investigations*. At FTT[263], it noted that in the case of a profession or vocation the question may not be very helpful. Both of these are correct statements of principle.

57. At FTT[265], the FTT turned to *Atholl House UT*. It set out [79] of *Atholl House UT*, which ends with the following passage:

> If the facts demonstrate that [Ms Adams'] professional life both in the tax years in dispute, and in previous tax years, involved her carrying on a business on her own account, and if the hypothetical contract with the BBC would be regarded as entered into in the course of that business, that would be perfectly capable of supporting a conclusion that the hypothetical contract was not one of employment.

58. The FTT referred to Cooke J's formulation of the business on own account test in *Market Investigations*, and to the judgment of the Court of Appeal in *Hall v Lorimer*. It concluded by noting that it is not appropriate at the third stage to adopt a "check list" approach, but to stand back and make a qualitative assessment.

59. We return to the FTT's summary of the applicable principles and case law after we have considered how the FTT applied those principles. In considering this ground of appeal, we must look at the Decision in the round, and not fall into the trap of focussing unduly or narrowly on particular words or phrases, or taking statements out of context.

60. At FTT[319]-[320], the FTT began its discussion as follows (emphasis added to original):

> 319. We have found that the broadcasters do have a sufficient measure of control to establish a prima facie case that there is a contract of employment. However, we do not consider that the extent of the broadcasters' control in either case is a compelling factor. **Essentially, we must consider whether there are other provisions of the contracts or other factors which displace the prima facie case and require a conclusion that the contracts are contracts for services rather than contracts of employment.**
>
> 320. **In our view the most significant factor that might displace the prima facie case that Mr Chiles was an employee under the hypothetical contracts is whether he was in business on his own account. But only if the hypothetical contracts can properly be seen as part of that business. That is the approach taken by the Upper Tribunal in *Atholl House* and in other cases.** It involves a value judgment and will depend on various factors which will carry different weight in the overall analysis.

61. The FTT then turned to whether Mr Chiles was in business on his own account. It is clear that the FTT was considering this question in the second context we identify above, namely whether he was in business on his own account by reference to his activities outside the Contracts. This is clear from FTT[323]-[324]:

> 323. Mr Tolley pointed out that BBL bears the burden of establishing that Mr Chiles should be treated as being in business on his own account. He submitted that there was a lack of documentary evidence which meant that we should not make any finding that Mr Chiles was in business on his own account. In particular, we could not assume that any other contracts entered into by BBL would themselves not subject to IR35.
>
> 324. We agree with Mr Tolley that we are not in a position based on the evidence and submissions before us to make any findings in relation to the status of the First ITV Contract so far as it relates to Daybreak or as to work done for the BBC on long-standing programmes such as Match of the Day 2 and The One Show. However we do consider that we have sufficient evidence from Mr Chiles to form a conclusion as to the nature of his other work, including work done for the BBC through independent production companies.

62. The FTT identified "the real question" before it as follows, at FTT[325] (emphasis added to original):

> In relation to BBL's other work, Mr Chiles' evidence was not challenged. We infer on the basis of our findings of fact that Mr Chiles' other work would not be considered that of an employee. We agree with Mr Rivett that Mr Chiles should be treated as being in business on his own account in all the tax years under consideration. **The real question is whether the hypothetical contracts were entered into as part of that business, or whether they should properly be viewed as contracts of employment separate to the business.**

63. The FTT discussed in detail the factors relevant to whether Mr Chiles was in business on his own account outside the Contracts for the relevant periods, and concluded that he was. The FTT framed the remaining question as it saw it at FTT[332]:

> We must now consider whether the hypothetical contracts are separate contracts of employment with ITV and BBC, or whether they should be seen as part of Mr Chiles' business.

64. We note the following statements from the FTT's reasoning, as indicative of the approach which it was adopting. The FTT referred to certain matters "which in our view point to [the Contracts] being part of the business he was conducting on his own account": FTT[333]. It considered that the absence of any right of substitution on the part of Mr Chiles "[did] not indicate that these contracts were outside Mr Chiles' established business activities": FTT[336]. At FTT[340] onwards, the FTT considered what is described as "the most significant factors relied upon by HMRC", being the duration of the Contracts, the contribution the Contracts made to Mr Chiles' income, and the absence of financial risk in performing the Contracts. It considered that "the length of the contracts does in our view indicate they were contracts of employment rather than part of Mr Chiles' business". At FTT[345] the FTT said this:

> Mr Chiles clearly had time over and above his commitments under the ITV Contracts and the BBC Contracts to conduct his business. We have set out above the income he derived from his business in the relevant tax years and the nature of the work he was carrying out in those years. It is not uncommon for businesses to have a small number of good, long-standing clients who effectively form the backbone of a business, a factor which we have noted was recognised by the Upper Tribunal in [*Atholl House UT*] at [113] quoted above.

65. At FTT[352], the FTT stated:

> Mr Chiles had a number of clients in his existing business. It is notable that he was working for both ITV and BBC at the same time in the period November 2013 to May 2015. The services provided by Mr Chiles for ITV and BBC fell fairly and squarely within the scope of his existing business activities. In relation to ITV, Mr Chiles was also involved co-producing That Sunday Night Show on behalf of ITV, which we are satisfied was part of his existing business.

66. In assessing the extent to which Mr Chiles could profit from sound business management, the FTT stated, at FTT[353]:

> As we have said, Mr Chiles could profit from sound business management of his activities generally. He conducted his activities in a business-like manner. The Avalon Agreement applied to his income from the hypothetical contracts in the same way as it applied to his other work. Mr Chiles' personal assistant helped him to better perform his duties under the hypothetical contracts as she did in relation to his other work.

67. The FTT's overall conclusion was at FTT[354]:

> We must stand back and look at the circumstances as a whole. Those circumstances include the prima facie existence of a contract of employment given the existence of mutuality of obligation and a sufficient framework of control. We take into account the nature and extent of the framework of control we have found to exist. We also take into account the nature and extent of the business which we have found Mr Chiles is to be treated as conducting on his own account. In all the circumstances we consider that Mr Chiles is to be treated as entering into the hypothetical contracts as part and parcel of that business. They were contracts for services and not contracts of employment. We conclude therefore that the condition in s 49(1)(c) ITEPA 2003 is not satisfied in relation to the ITV Contracts or the BBC Contracts in any of the relevant tax years.

Did the FTT err in law in its approach to the Third RMC Stage?

68. We have described the FTT's reasoning and approach in some detail because, as we have said, we must consider its decision in relation to the third RMC Stage in the round, and not focus unduly on particular words or phrases or take them out of context.

69. It is helpful to recap how the Court of Appeal described the errors of law in this respect made by the Upper Tribunal in *Atholl House UT*. We have set out the relevant section from *Atholl House CA* at paragraph 54 above, but it is worth repeating the following passage:

> 126. …the test which the UT set itself at [112]-[116] was whether there was "some relevant difference between the activities undertaken for the BBC and those performed as an independent contractor". Unless there was some such difference, Ms Adams would be performing her services under the hypothetical contract with the BBC as an independent contractor.
>
> 127. In my judgment, this approach is with respect to the UT flawed in a number of important respects.
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> 128. First, as the UT recognised in the first sentence of [112], *Fall v Hitchen* had made clear that an individual can in the same tax year perform similar services both as an employee and as an independent contractor. It is not the activities that matter but the capacity in which, and the conditions under which, they are performed. For that purpose, it is a relevant fact, if known or reasonably available to the putative employer, that the individual performs similar services as an independent contractor, but it goes no further than that.
>
> 129. Second, insofar as this approach is concerned with the terms and circumstances under which Ms Adams performed her services, it is not the terms and circumstances of her other engagements which are in issue, but the terms and circumstances of her hypothetical contracts with the BBC. The terms and circumstances of her other engagements may well themselves have been varied and it cannot be assumed that, if analysed, all or indeed any of them would be found to be engagements as an independent contractor. They cannot be held up as a gold standard against which the contracts with the BBC were to be judged. Even if the FTT had received evidence of these other engagements and the circumstances in which they were made, the approach of the UT is misguided.

70. While Mr Rivett put BBL's case with force and eloquence, we have concluded that the FTT did take the wrong approach in this case, and, perhaps understandably, fell into the same sort of error as the Upper Tribunal in *Atholl House UT*.

71. This conclusion is not the result of a challenge to the FTT's evaluative judgment; we shall turn shortly to other aspects of Ground 1 which in our view may stray into that territory. Rather, it was an error of law in the way in which the question for determination at the Third RMC Stage was formulated, both at a general level and in terms of the granular analysis.

72. In *Atholl House UT*, the Court of Appeal identified as "flawed in a number of important respects" an approach which depended on the relationship between the services performed by the individual under the contract in question and the services performed by them outside the contract. The Court of Appeal explained why that was the wrong approach.

73. Carefully considering the Decision as a whole, and avoiding an undue focus on isolated words or phrases, we have concluded that the FTT took the same sort of flawed approach in this case. The FTT's approach rested on (1) its finding that outside the Contracts Mr Chiles

was carrying on a business on his own account, and (2) its assumption that the answer to question at the third stage depended primarily on whether the Contracts were entered into in the course of that business.

74. It does not matter whether this approach was in all respects identical to that adopted in *Atholl House UT*, because it clearly suffered from substantially the same flaws as those identified in *Atholl House CA*. Put simply, that approach does not answer the question as framed by MacKenna J in *RMC*, which is how to characterise the terms of the contract in point, but a different question, which is the relationship between the activities under that contract and the individual's other activities.

75. It is no answer to this to point out, as Mr Rivett did, that the case law establishes that there is no single approach to determining the Third RMC Stage. That is indeed the case, but there is a difference between a choice of permissible approaches to answering the question arising at the third stage and asking the wrong question. The "business on own account" test may, as we have seen, be one way of answering the question, but the focus of the FTT's reasoning, looked at in the round, was not on the business on own account test in that context, but on whether the Contracts were part of the business on own account found by the FTT to exist in its second context, namely outside the Contracts.

76. The approach of the FTT is in our view clear from the passages which we describe and set out above. It begins with the reference to *Atholl House UT* at [79], and is evident in particular from FTT[320], [325], [333], [336], [345], [352] and [354].

77. We do not accept Mr Rivett's suggestion that (as he put it) we should look at what the FTT did, rather than how it did it, and what it did was to carry out a multi-factorial evaluation as required. The FTT's conclusion depended on the way it framed and approached the question, and *Atholl House CA* tells us that the way it framed and approached the question was flawed in important respects.

78. We will comment briefly on the remaining threads of Ground 1 which we identified above. These were that the FTT had focussed unduly on the business on own account test and failed to keep the terms of the hypothetical contracts at the centre of its enquiry, and that the FTT's evaluation of the hypothetical contracts took into account irrelevant factors and failed to give weight to relevant factors.

79. The first of these arguments in one sense simply identifies a consequence of the error of law which we have found. The Court of Appeal in *Atholl House CA* made clear that at the Third RMC Stage the terms of the hypothetical contract must remain "central to the enquiry", and that "it is not the terms of [the] other engagements which are in issue, but the terms and circumstances of [the] hypothetical contracts". Insofar as this argument is an argument as to the consequences that are likely to follow if the FTT does not adopt the correct approach, we agree. If the "real question" is seen as whether the contract in question was entered into as part of an existing business on own account, that will naturally cause the tribunal to focus on that question; that does not mean that the terms of the hypothetical contracts would be ignored, but they would not be central to the tribunal's inquiry.

80. However, insofar as HMRC seek to argue that the FTT erred in law by failing to take into account the terms of the hypothetical contracts in reaching its decision, we do not accept that argument. In *Atholl House CA*, the Court of Appeal stated that, with one exception, there was "no consideration at all by the UT of the terms of the hypothetical contracts", and "the UT failed to have regard to any other terms, including those that pointed in the direction of

employment". In this case, the FTT did consider various terms of the hypothetical contracts at the Third RMC Stage, including certain terms which pointed toward employment. The weight to be given to the various terms was a matter for the FTT's evaluative judgment, and the fact that HMRC disagree with the FTT's evaluation, or would wish other terms to have been considered in detail, is in substance a challenge to the FTT's evaluative judgment, which we reject.

81. The final argument under Ground 1 is that the FTT took into account irrelevant factors and failed to take into account or give sufficient weight to relevant factors at the Third RMC Stage. Again, in one sense it must be a consequence of the error of law that we have found that the FTT did so, but at this stage we are concerned with any errors distinct from that. This included, say HMRC, a failure to recognise and give weight to the "compelling" extent of control which the BBC and ITV had over Mr Chiles. This is in substance an *Edwards v Bairstow*[2] challenge to the FTT's findings of fact. There is limited scope to interfere with an evaluative judgment of the FTT. In *Quashie v Stringfellow Restaurants Limited* [2012] EWCA Civ 1735 at [9], the Court of Appeal said this:

> …The responsibility of determining and evaluating all the relevant admissible evidence (both documentary and otherwise) is that of the tribunal in the first instance; an appellate tribunal is entitled to interfere with the decision of that tribunal, that a contract of employment does or does not exist, only if it is satisfied that in its opinion no reasonable tribunal, properly directing itself on the relevant question of law, could have reached the conclusion under appeal, within the principles of *Edwards v Bairstow* [1956] AC 14.

82. The fact that the FTT may not have properly directed itself as to the approach to be taken at the Third RMC Stage does not mean that it did not properly direct itself in considering and weighing the terms of the hypothetical contracts. We do not consider that the evaluative conclusion reached by the FTT in relation to the hypothetical contracts was one which no reasonable tribunal could have reached, but given the error of law which we have found this is of no consequence either way.

83. So, we allow HMRC's appeal under Ground 1 that the FTT erred in law by adopting the wrong approach to the determination of the Third RMC Stage, but do not agree that the FTT made the distinct errors of law asserted under Ground 1.

Conclusion

84. For the reasons given, we consider that the FTT erred in law in its approach to the Third RMC Stage. We cannot conclude that the FTT would have reached the same conclusion but for its error. The error was material, so we must set aside its decision in relation to the Third RMC Stage.

85. This conclusion is sufficient for HMRC to succeed on Ground 1. Since Ground 2 was presented by HMRC on the basis that it fell to be determined if we rejected Ground 1, there is no need to consider Ground 2, and we do not do so.

86. We discuss below the disposition of the appeal.

[2] *Edwards v Bairstow* [1956] AC 14.

Relevance to hypothetical contract

87. It is helpful to begin by describing the issue. At the Third RMC Stage, it is necessary to take into account all relevant facts and circumstances in determining whether the hypothetical contracts would have been contracts of employment. That is so whether or not that determination is made by taking an "RMC approach" or a "*Hall v Lorimer* approach". In *Atholl House CA*, Sir David Richards said at [122]:

> …both approaches require the identification and overall assessment of all the relevant factors present in the particular case. In other words, they are both multi-factorial in their approach.

88. However, in *Atholl House CA*, the Court of Appeal expressed a limitation on the factors which could be properly taken into account. Sir David Richards identified it at *Atholl House CA* [123]-[124], quoted above.

89. The only other reasoned decision in *Atholl House CA* was given by Arnold LJ, who endorsed this view, at [170];

> … as Sir David says at [123], the answer to the question as to what limit there is on the factors to be taken into account is supplied by basic principles of contract law. In a case like the present, the issue is one of interpretation of a written contract (or, to be more precise, a hypothetical contract derived from a written contract with the alteration of the identity of one of the contracting parties). That contract, like any other agreement in writing, should not be construed in a vacuum, but in the light of the admissible factual matrix. It follows that a factual circumstance known to both parties at the date of the contract (such as, for example, the fact that the person providing the work has an established career as a freelance) should be taken into account. It also follows that a factual circumstance not known or reasonably available to one party (such as, for example, the precise terms on which the person doing the work has performed work for other parties if those terms have not been disclosed to the alleged employer) cannot be taken into account.

90. As we have described, HMRC wish to argue in support of their grounds of appeal that the FTT erred in law by failing to take into account, and BBL failed to prove, whether relevant matters were known or reasonably available to the BBC and/or ITV. We refer to this as the knowledge issue. BBL object to this, arguing that the issue was not raised before the FTT and it would be procedurally unfair to permit it to be argued in this appeal. In granting permission to appeal, Judge Cannan left this matter to be determined by the Upper Tribunal.

Arguments of the parties

91. Mr Rivett made the following arguments in his written and oral submissions:

(1) The knowledge issue was not part of the ratio of *Atholl House CA*, and so is not binding, or, alternatively, the Court of Appeal is wrong on this issue because it is inconsistent with previous authorities.

(2) BBL had first appealed to the FTT 6 years ago and the first contract relevant in the appeal was negotiated 14 years ago. Making new findings of fact now in relation to

the knowledge issue would be very difficult because of the effluxion of time and would impose an unfair additional burden on Mr Chiles and witnesses on his behalf.

(3) The procedural history of the appeal compounded the unfairness which would arise from permitting a new argument to be run by HMRC at this very late stage. In particular, the FTT had refused permission for BBL to run a new argument at the FTT hearing and had also refused its application for disclosure from HMRC, which included material relating to *Atholl House*.

(4) The approach to new arguments raised late in the appeal process is considered in *HMRC v Ritchie* [2019] UKUT 71 (TCC) ("*Ritchie*"). This established that the guiding principle in determining whether to admit a new argument was "fairness in the circumstances of the case" and also that where a new argument gave rise to the possibility that it might be rebutted by further evidence, the other party must have a fair opportunity to bring that evidence to the tribunal. As in *Ritchie*, in this appeal it would be too late and would be unfair for the knowledge point to be admitted now.

(5) At all stages up to HMRC's application to the FTT for permission to appeal, both parties had proceeded on the basis that the FTT could and should take account of facts outside the terms of the hypothetical contracts. BBL had no reason to think that HMRC might take the position that only facts found to be within the actual or constructive knowledge of the BBC and/or ITV could be taken into account.

(6) Once HMRC had raised the knowledge issue, BBL invited HMRC to agree various facts relevant to the knowledge issue, and HMRC had refused to engage because the facts sought to be agreed had not been the subject of cross-examination.

(7) HMRC say that they do not need permission to raise the knowledge issue because the burden of proof in the appeal is on BBL. However, the burden of proof on BBL to displace an assessment does not mean that a taxpayer must prove aspects of its case which are common ground and not challenged by HMRC.

(8) HMRC have not identified the facts relevant to a finding that Mr Chiles was in business on his own account which remain to be found, taking into account the knowledge issue.

(9) The need for new evidence and a new hearing would offend against the principle of finality in litigation and be grossly unfair to Mr Chiles.

(10) The FTT made all the necessary findings of fact including as to the knowledge issue or had available sufficient evidence to do so.

(11) Even if the FTT did err in this respect, it was not material to its decision.

92. Mr Tolley argued as follows:

(1) The Court of Appeal has confirmed that before any matter may be regarded as a relevant factor at the Third RMC Stage, it must be known or reasonably available to both contracting parties. However, BBL advanced no case, and consequently the FTT made no finding, as to whether a circumstance (such as the capacity in which Mr Chiles undertook other work) was known or reasonably available to the BBC and/or ITV when the contracts were made.

(2) BBL's assertion that the FTT did not thereby err in law because the knowledge issue did not form part of HMRC's pleaded case before the FTT is misconceived. The burden of proof in the appeal was on BBL to prove the knowledge issue. They did not do so, and so HMRC was not obliged to deal with an argument that was never raised by BBL.

(3) HMRC is not taking a new point and so does not need permission to make the argument in this appeal.

(4) The position in this case was not the same as in *Ritchie*.

Discussion

93. The first question is the extent to which the statements of the Court of Appeal in *Atholl House CA* on the knowledge issue are binding. As valiantly as Mr Rivett argued his case, we consider it clear that those statements are intended to set out general guidance as to the position in law regarding the factors which can permissibly be taken into account at the Third RMC Stage. That is so regardless of whether those comments form part of the ratio of the decision. Nor do we accept that because earlier authorities did not deal with the issue, and the Court of Appeal did not intend to call any of those authorities into doubt, we do not need to follow the Court of Appeal's guidance. The Court of Appeal decision on this issue does in our view develop (or at the least clarify) the law, and as a decision of a superior court setting out general guidance we must follow it.

94. As to whether either party is somehow at fault for not raising the issue in its pleadings and evidence, we do not think that either the parties or the FTT were in any way remiss in not dealing with this issue. HMRC's reliance on the burden of proof on BBL to displace the assessment is misplaced, and we do not regard recourse to the burden of proof as helpful in determining the way forward in this situation. Nor do we accept HMRC's assertion that this is not a new point. It was not in play before the FTT. In our view, the reason it was not in play is that until *Atholl House CA* this restriction on the factors which are relevant at the Third RMC Stage had not been identified, at least explicitly, in the authorities[3]. It is a new ground of appeal.

95. The decision as to whether HMRC should be permitted to rely on that ground in this appeal must take into account all the facts and circumstances, including procedural fairness. The principle of finality in litigation militates against the admission of new grounds of appeal, particularly where they raise questions of fact. However, in this case there are two other important factors to weigh in the balance. First, unlike *Ritchie*, in practice the ground was, in our view, not one which either party would be likely to have thought to raise before the FTT. This was not a case where HMRC sat on their hands and made a deliberate or tactical choice not to raise an issue before the FTT. Whether one regards the Court of Appeal's decision on this issue as a development of the law or merely as explicit clarification, the primary reason why the ground has arisen late is because of that decision. Second, we have decided that the FTT's decision in relation to the Third RMC Stage must be set aside in any event. So, the FTT's decision in relation to the Third RMC Stage must either be remade by this tribunal, or remitted and reconsidered by the FTT with directions: section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"). This means that if the knowledge issue were not to be admitted, then that process would produce a fresh decision

[3] The knowledge issue is not referred to in the Court of Appeal's decision in *Kickabout*, which was released on the same day as *Atholl House CA*, and which refers briefly to other aspects of *Atholl House CA*.

which did not take into account the position in law regarding relevant factors at the Third RMC Stage as set out in *Atholl House CA*.

96. We have not found this to be an easy decision. The toll which the prolonged appeal process has already taken on Mr Chiles is significant, and was described by him in a powerful witness statement which we have considered again and with care in preparing this decision. That has caused us great concern, both at the hearing and subsequently, in relation to procedural unfairness. While the decision to set aside the FTT's decision on the Third RMC Stage in any event does weigh in favour of admitting the argument, in practice the consequence of admitting it would be that additional questions of further evidence and fact-finding would arise for determination, which is relevant to procedural unfairness.

97. It was largely those concerns which prompted us to direct towards the end of the hearing that the parties should attempt to agree as many facts as possible relevant to the knowledge issue in this appeal. Our aim was to establish the extent to which the issues relevant to actual or constructive knowledge, primarily relevant to Mr Chiles' business activities outside the Contracts, could be narrowed by being agreed and therefore resolved in advance of any remaking or remittal of the FTT's decision as to the Third RMC Stage. That, we hoped, would reduce the extent to which the tribunal was required to make further findings of fact, and to consider applications from the parties to adduce further evidence.

98. The process did not prove constructive. On 20 February 2024, as directed, HMRC produced "a statement of facts regarding other work carried out by BBL which it is accepted by HMRC were, at the time that the relevant contracts were entered into, known or reasonably available to each of (i) ITV and (ii) the BBC". On 5 March 2024, as directed, BBL produced an 8-page response. This stated that "BBL's position, with considerable regret, is that the Statement demonstrates that HMRC are unable or unwilling to adopt a position that would enable the knowledge issue to be determined by the FTT within reasonable and proportionate evidential and legal perimeters [sic] were the appeal to be remitted to the FTT and HMRC granted permission to argue that relevant facts were not known or reasonably available to ITV and the BBC". The response set out a number of criticisms of HMRC's statement and their past conduct, and repeated various submissions made at the hearing, but what it did not do was, as we had hoped, suggest drafting changes or additions to HMRC's draft statement of agreed facts. We recognise that concerns about the duration and course of the process to date may have inhibited BBL's response, but we think that HMRC's statement of facts was a genuine and useful effort to identify facts that could be in dispute on the question of actual or constructive knowledge. It was certainly a much more helpful approach than its earlier refusal to engage which we have referred to at paragraph 96(6) above, which, without going into all the procedural details, we think was unfortunate.

99. We have reached the conclusion that, on balance, HMRC should be permitted to raise the argument that the FTT erred by failing to make findings as to whether factors identified as relevant at the Third RMC Stage, particularly in relation to Mr Chiles' activities outside the Contracts, were within the actual or constructive knowledge of the BBC and ITV, as described in *Atholl House CA*. The new argument relates to a change in the legal principles which had been generally understood to be applicable in that respect, and the FTT's decision on the Third RMC Stage is being set aside in any event and so must be remade or remitted.

100. Having admitted the argument, we consider it clear that it succeeds. The FTT did not make the relevant findings in relation to the knowledge issue. We repeat that in our view no blame for this lies with the FTT or either party. However, in making the assessment required

at the Third RMC Stage, the position as regards factors which may be taken into account as relevant is now as set out in *Atholl House CA*.

101. The error of law was material. Therefore, HMRC succeed on this ground of appeal.

Disposition

102. We set aside the FTT's decision in relation to the Third RMC Stage.

103. With reluctance, we have concluded that we should not remake the decision on this issue but should remit it for reconsideration by the FTT. The error of law relating to the approach to the Third RMC Stage must be corrected by framing the question correctly and the error of law relating to the knowledge issue must be corrected by making any necessary findings as to knowledge. As the Court of Appeal expressed it, in *Atholl House CA* at [163]:

> …What is now required is an assessment of whether overall there would under the hypothetical contracts have existed an employment relationship between Ms Adams and the BBC. For this purpose, there need to be taken into account the terms of the hypothetical contracts and their effects, and the circumstances in which such contracts would have been made insofar as they would have been known to both parties or were reasonably available to both parties.

104. The Third RMC Stage requires a multifactorial assessment of all the terms and circumstances relevant to the hypothetical contracts. The FTT's assessment was, unfortunately, approached through the wrong prism, asking whether the Contracts were entered into as part of Mr Chiles' business on own account outside the Contracts, and the FTT is best placed to reframe the question and carry out that assessment through the correct prism. In relation to Mr Chiles' activities outside the Contract, including the knowledge issue, the FTT is also best placed to determine what findings to make, and what evidence to admit from the parties. Without in any way tying the FTT's hands, we think and hope that HMRC's statement of facts of 20 February 2024 may provide a starting point which enables any further fact finding on the knowledge issue to be limited, and to require no, or only very little, further witness evidence, particularly taking into account what the Court of Appeal says about the relevance and significance of the knowledge issue in *Atholl House CA*.

105. We remit the Decision for reconsideration by the FTT, with the following directions:

(1) The FTT shall reconsider and remake its decision in relation to the Third RMC Stage and in relation to its disposition of the appeal, taking into account and applying the guidance given in *Atholl House CA*, both in relation to the correct approach to the Third RMC Stage and in relation to the knowledge issue, and taking into account the terms of this decision.

(2) The decision shall be so remade on the basis of the FTT's findings in the Decision in relation to the mutuality of obligation and control stages of *RMC*, and on the basis of the findings of fact in the Decision and any further findings of fact that the FTT considers appropriate to make.

(3) It shall be for the FTT to determine whether to make any further findings of fact and whether to allow further evidence to be admitted.

106. We see no reason why the remitted hearing should not be heard by the same panel as that which made the Decision, if practicable. Judge Cannan has recently been appointed a salaried judge of this Tribunal, but may, of course still sit in the FTT. Indeed, if Judge Cannan and Mr Woodman are available, it would be more efficient for them to hear the remitted case, given their familiarity with the facts and issues.

MR JUSTICE MEADE
JUDGE THOMAS SCOTT

Release date: 07 June 2024